UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

COMAU, INC.
Respondent Employer

and **Cases 7-CA-52614 and 7-CA-52939**

AUTOMATED SYSTEMS WORKERS LOCAL 1123, affiliated with CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA
Charging Party

and

COMAU EMPLOYEES ASSOCIATION (CEA)
Party in Interest

COMAU EMPLOYEES ASSOCIATION (CEA)
Respondent Union

and **Case 7-CB-16912**

AUTOMATED SYSTEMS WORKERS LOCAL 1123, affiliated with CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA
Charging Party
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RESPONDENT UNION CEA'S ANSWERING BRIEF IN OPPOSITION TO THE COUNSEL FOR THE ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS

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INTRODUCTION

The CEA opposes the Cross-Exceptions submitted by the Acting General Counsel. However, to a great extent, the Cross-Exceptions have already been addressed in the briefs previously filed by the CEA, by the employer, or both. Nevertheless, certain points call for further discussion.

ARGUMENT

Agency

The General Counsel asserts that Mr. Yale, Mr. Reno and Mr. Burbo were acting as agents of the employer in connection with the circulation of the disaffection petition in December, 2009. The record reflects, of course, only one brief, transient, and incidental connection between Mr. Reno, Mr. Burbo and the petition, and the General Counsel has failed to show that those employees played any meaningful or relevant role whatsoever in the petition process.

Even with regard to Mr. Yale, the General Counsel cannot avoid the fact that, as a matter of law, one acting as an officer or an agent of a labor organization is excluded from the definition of employer. 29 USC §152(2). It is clear from the petitions themselves as well as from Mr. Yale's testimony that he was working to establish the CEA, from the time of the decertification petition (Tr. 1023) through the election of officers of the CEA after submitting the disaffection petition to the employer. (Tr 1037-1039)

Since the burden is on the General Counsel to prove employer agency, the burden is on the General Counsel to prove that Harry Yale was not acting for the CEA. The General Counsel has not done so. For that reason alone, the Board should reject the General Counsel's agency argument as a matter of law.

In its Brief in Support of its Cross Exceptions, the General Counsel cites *Service Employees International Union*, 322 NLRB 402 (1996) for the proposition that one can be an agent both of an employer and a labor organization. The General Counsel misapprehends the holding of that case.

In *Service Employees*, the individual in question was found to be a statutory supervisor under 29 USC §152(11) because the employer had invested him with significant authority, including the power to discipline employees up to and including discharge. Because he was a statutory supervisor, and because that designation is included within the statute, his designation as an agent was permitted by the statute. But there is no basis for extending that holding to the present case. Here, it was stipulated that the leaders in this case were not statutory supervisors. There is thus no statutory authorization for disregarding the otherwise plain language of §152(2). Because *Service Employees* was based on specific statutory language not applicable here, it is irrelevant to the present case.

The General Counsel further asserts that the factual findings of the ALJ support a determination of agency. Assuming for the sake of discussion that the statute permits such a determination, the findings of the ALJ would not support it. The ALJ did find that leaders have certain functions which are different from the functions of some other employees. But the ALJ did not make a single finding which would indicate that the team leaders played any role whatsoever <u>in labor relations</u>, or were perceived by the workers to be part of management. It is not enough to assert some vague concept of agency in general; instead:

> The party who has the burden to prove agency must establish agency relationship <u>with regard to specific conduct that is alleged to be unlawful</u>. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001) (emphasis added).

There is no indication that Harry Yale, or any leader, had any role in connection with health care or labor relations, or that the employees thought they did. The factual findings of the ALJ do not support the General Counsel's proposed conclusion.

Furthermore, the General Counsel has failed to confront the fact that the Charging Union includes team leaders among its own leadership, and historically has been led by Comau team leaders. The General Counsel has not even attempted to explain why, if leaders are de facto employer agents, this Board should enter an affirmative bargaining order in favor of a union whose leadership includes employer agents. If the General Counsel is right about team leaders being company agents, then the relief proposed by the ALJ requires this Board to enter an order contrary to its own foundational principles.

The record also indicates that the Charging Union itself has addressed this issue in the past, and determined that team leaders were not management, but were properly members of the bargaining unit. The Charging Union's bargaining team for the March 5, 2002 collective bargaining agreement reviewed the job descriptions of the leaders and modified the language to make it clear that leaders were not supervisors, and that what a team leader does is provide "individual and team leadership." (Tr 968-970). Since the Charging Union itself has determined that team leaders are not acting for management merely because of their job functions, the General Counsel should be estopped from arguing to the contrary for the benefit of that same Charging Union.

For all these reasons, ALJ Carter was properly reluctant to find that team leaders were agents of the employer for any relevant purpose. Indeed, he should have found to the contrary.

Alleged Employee Perception of Support of Petition by Comau

The General Counsel asserts in its fifth cross exception that the ALJ should have found that an employee would reasonably believe that the petition was supported by Respondent Comau. But there is no evidence for that assertion, other than as a side effect of the agency argument discussed above. Furthermore, the Charging Union had determined in 2002 that leaders properly belonged in the bargaining unit, despite their job functions, and were not management. That determination was incorporated into all subsequent collective bargaining agreements. The General Counsel should be precluded from arguing that the employees perceived them to be speaking for management as a result of those same job functions.

REQUEST FOR RELIEF

For all of the reasons set forth above, Respondent CEA requests that the Board respect the wishes of the men and women of the bargaining unit, reject the recommended opinion of the ALJ, and leave intact this bargaining unit's choice of bargaining representative.

Respectfully submitted,

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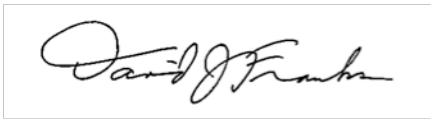

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Dated: March 15, 2011

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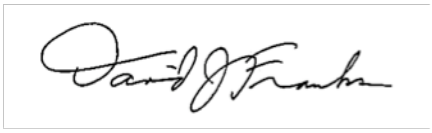
PROOF OF SERVICE

I hereby certify that on March 15, 2011, I caused to be served via electronic mail a copy of the following: **Respondent Union CEA's Reply Brief in Support of Its Exceptions, Respondent Union CEA's Answering Brief in Opposition to the Counsel for the General Counsel's Cross-Exceptions** and this **Proof of Service** upon the following (see attached):



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